IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2908 OF 2003

Contract Laghu Udyog Kamgar Union ... Petitioner

V/s

Shri S.N. Saundankar,
Presiding Officer,
Central Govt. Industrial Tribunal No.2,
Mumbai and ors. ... Respondents

Ms. Jane Cox for the petitioner.

Ms. D.A. Dubay for the respondent No.2.

Ms. S.V. Kher for the respondent No.3.

Ms. A.R.S. Baxi for the respondent No.4.

CORAM: DR. D.Y. CHANDRACHUD, J.

DATED: 31ST AUGUST, 2006

ORAL JUDGMENT:

1. This proceeding arises out of an award of the Industrial Tribunal rendered on 19th March, 2002 on a reference to adjudication under Section 10 of the Industrial Disputes Act, 1947.

2. On 31st March, 1998, the Central Government referred the following question for adjudication to the

Industrial Tribunal under Section 10 of the Industrial Disputes Act, 1947:-

> "Whether the action of the management of Unit Trust of India, Mumbai in not regularising their 52 canteen workers (as per the list enclosed) engaged by them at their four premises, i.e. Head Office at Marine Lines, Vashi Branch, Andheri Branch and World Trade Centre, Colaba, Mumbai is legal and justified ? If not, to what relief the said workman is entitled ?"

3. The dispute, as the terms of reference would show, relates to the services of canteen workmen engaged by canteen contractors at four premises of the Unit Trust of India in the City of Mumbai.

4. Some time in the year 1994, the Contract Laghu Udyog Kamgar Union instituted a proceeding in this Court under Article 226 of the Constitution (W.P. 2605 of 1994) seeking a declaration that the workers on whose behalf the petition was instituted were employees of the Unit Trust of India ("UTI") and were entitled to receive the same benefits that were available to permanent

employees. A direction was sought to the Union of India to abolish the utilization of contract labour in all work connected with the running of canteens. The petition before this Court proceeded on the allegation that the contractor, who at the material time was one Pawankumar Gupta of Satkar Services was purely a "name-lender and sham contractor". The union contended that, all the infrastructure for running the canteen was provided by UTI. The Union apprehended that since the canteen at the establishment of UTI at World Trade Centre has been closed down, similar action would be taken at the other establishments. UTI filed an affidavit in reply denying that the canteen contract was a sham arrangement and that the workers were entitled to a declaration that they were direct employees of the principal employer. UTI denied the allegation that control and supervision over the workers of the contractor was exercised by its officers. The petition was adjudicated upon by a Division Bench of this Court by a judgment and order dated 13th January, 1995. At that stage, reliance was placed by the union on a judgment of the Supreme Court in **M.M.R. Khan v/s Union of India, reported in A.I.R. 1990 SC 937.** A concession was made on behalf of the Union that the canteens that were run in the premises of UTI were neither statutory

canteens (meaning thereby, canteens established in pursuance of the obligation under Section 46 of the Factories Act, 1948) nor recognised non-statutory canteens. The Division Bench came to the conclusion that the workmen were not entitled to the relief of being regarded as direct employees of UTI and of being paid at par with the regular employees since the decision of the Supreme Court in **M.M.R. Khan** (Supra) rested on circumstances specific to the railways, mainly on the provisions of the Railway Establishment Manual. The Division Bench in holding thus relied upon the judgment of the Supreme Court in **Surendra Prasad Khugsal v/s Chairman M.M.T.Corporation of India and another, reported in JT 1993 (5) SC 80.** The Division Bench held thus -

> "At the time of hearing, learned counsel for the petitioner conceded that the canteen run in the premises of respondent No.1 is neither a statutory canteen nor a recognized non-statutory canteen. He, however, submitted that he is entitled to the declaration prayed for on the strength of the Apex Court decision rendered in M.M.R. Khan v/s. Union of India, A.I.R. 1990 Supreme Court 937 and the

decision of the Division Bench of this Court in Transport and Dock Workers Union v/s. Union of India and others, in Writ Petition no. 3513 of 1991, rendered on August 25, 1994. In M.M.R. Khan's case, the employees employed in the statutory canteens run by the railways were held to be railway servants on the basis of paras 2829, 2832 and 2830, Chapter XXVIII of the Railway Establishment Manual. The ratio of this judgment was explained by the Apex Court in Surendra Prasad Khugsal v/s Chairman, M.M.T. Corporation of Indian & another, JT 1993 (5) Supreme Court 80. In Surendra Prasad Khugsal's case, the workers employed in the non-statutory recognized canteens of National Small Scale Industries corporation and 2 other similarly situated Corporations sought a declaration that they be treated on par with the Central Government employees and be granted the same status as that of the civil servants with all the benefits and pay scales with effect from October 1, 1979. The petitioner in that case, in support of his contention, relied upon the decision in M.M.R. Khan's case. The Apex

Court, explaining its decision in M.M.R. Khan's case, observed thus :-

> "6. We have heard both the parties in all the petitions at some length. The petitioners in all the petitions place their reliance on the decision in the M.M.R. Khan's case (1990(Supp.) SCC 191) (Supra). However, we find that the said case which admittedly concerned the canteen workers both in the statutory canteens and recognized non-statutory canteens was decided on the facts of those cases including the provisions of the Railway Manual, the notifications and circulars issued by the Railway Board from time to time and other documents which pertained to the workers employed in the said canteens. None of the material which was taken into consideration there has relevance to the workers concerned in the present canteens."

The ratio of the decision rendered in Surendra Prasad Khugal's case squarely covers the instant case. The material which was taken note of by the Apex Court in M.M.R. Khan's case has no relevance to the workers working in the canteens run by respondent No.2."

5. The Union thereupon sought reference to adjudication under Section 10 of the Industrial Disputes Act and in terms of the demand that was raised, a reference was made by the Central Government on 31st March, 1998. Evidence was adduced before the Tribunal by one of the workmen who was employed in the canteen. Several

witnesses deposed on behalf of the management. The Tribunal rejected the reference by its award and came to the conclusion that the contract under which the workmen had been engaged was not a sham arrangement. The Tribunal held that the workmen were appointed by the canteen contractor and that they worked under the control and supervision of the contractor. Applications for leave were submitted to the canteen contractor and the wage register was maintained by the contractor. Though UTI provided the infrastructure necessary for running the canteen, the Court held that the evidence demonstrated that the entire control and supervision was with the contractor. The Tribunal held that providing a canteen was not part of the conditions of service for the employees of UTI. Demands for the establishment of a canteen in certain establishments had been dropped when industrial settlements were signed. In certain establishments canteen facilities were in fact found to have been discontinued. In sum and substance, the Tribunal held that the canteen is not an incident of the conditions of service of the employees.

6. The findings of the Tribunal have been questioned in the submissions urged by learned counsel for the petitioner before this Court from two perspectives. The

first submission that has been urged is, that though the contractor was appointed to conduct and manage the canteen, the contractual arrangement was entirely sham and bogus and that, as a matter of fact, the entire supervision and control was vested with the management of the principal employer, namely, UTI. The second submission that has been urged is that even if the canteen contract is not regarded as sham and bogus, the canteen must be regarded as having become an implicit part of the conditions of service of the employees of UTI as envisaged in the judgment of the Supreme Court in **Parimalchandra Raha v/s L.I.C., reported in 1995 II C.L.R. 194.** Each of these submissions must now be considered.

7. The question as to whether a contractual arrangement that is entered into by the principal employer with a contractor is sham and bogus cannot be determined **on a priori** basis or on the basis of a formula with a universal application. In law as in life events, actions and circumstances determine outcomes. In **Workmen of Nilgiri Co-op. Marketing Society Ltd. v/s State of Tamil Nadu & ors., reported in (2004) 3 SCC 514,** Mr. Justice S.B. Sinha speaking for the Supreme Court held that the question in each case must be

answered having regard to the facts that are involved. The learned Judge held that no single test-be it the control test, the association test or any other test can be determinative in arriving at the existence of a jural relationship of employer and employee. The Court held that several factors would have a bearing on the issue, these being - (a) who is the appointing authority; (b) who is the paymaster; (c) who can dismiss; (d) how long does the alternative service last; (e) the extent of control and supervision; (f) the nature of the job e.g. whether it is professional or skilled work; (g) the nature of establishment; and (h) the right to reject. The Supreme Court commended an integrated approach that is, a functional approach that would integrate all the relevant tests for examining whether a workman was fully integrated with the concern of the employer. The Supreme Court also held that it was a settled principle of law that the person who sets up a plea of the existence of an employer-employee relationship must discharge the burden that is cast upon him of two establishing the existence of such a relationship.

8. In the present case, on behalf of the union, evidence was adduced of Shri Tanaji Jadhav who was

employed by the canteen contractor. In the course of his examination-in-chief, the workman deposed that the canteen workers were supervised and controlled by the management of UTI and that there existed a Canteen Committee. The menu, according to the witness, was settled by the Canteen Committee in consultation with the union representatives. In the course of his cross-examination, the workman however admitted that (i) his services came to be recruited by the canteen contractor; (ii) initially he was working in another building when the same individual was a contractor; (iii) permission for the grant of leave was required to be taken from the contractor by him as well as by other workmen; (iv) neither the deponent nor the other canteen workmen have been appointed by UTI; (v) all the workmen signed the salary register and wage register maintained by the contractor and it was the contractor who paid the salary and wages; (vi) the menu at the canteen was fixed in consultation with the officers of UTI, the Canteen Committee and the Union; (vii) the contractor was responsible for the preparation of the food in the canteen and to maintain the quality of the food and hygiene in the establishment; (viii) the workmen worked in accordance with the advice of the

contractor. These admissions that were elicited during the course of the cross-examination constitute, in my view, sufficient material to sustain the finding of the Tribunal that the contractual arrangement under which UTI had appointed a canteen contractor was not sham and bogus. The admissions of the workman who deposed on behalf of the Union clearly establish that recruitment was carried out not by UTI but by the canteen contractor, wages were paid by the canteen contractor, and the work was supervised by the canteen contractor. The canteen contractor was responsible for maintaining the quality of the food that was supplied in the canteen. The workmen worked under the advice of the contractor. On this state of the evidence, it cannot be held that the canteen contract constituted a sham and bogus arrangement.

9. The next limb of the submission that is urged on behalf of the petitioner is that the canteen must be regarded as having implicitly become a part of the conditions of service of the employees of UTI and that consequently the workmen of the canteen would be entitled to a declaration that they were direct and regular employees of the establishment. This submission was urged on the basis of the judgment of the Supreme

Court in **Parimal Chandra Raha v/s L.I.C., 1995 II C.L.R. 194.** The principles which were formulated by the Bench of two learned Judges in **Parimal Chandra Raha's case (Supra),** in para 27 of the judgment, were as follows:

> "(i) where, as under the provisions of the Factories Act, it is statutorily obligatory on the employer to provide and maintain canteen for the use of his employees, the canteen becomes a part of the establishment and, therefore, the workers employed in such canteen are the employees of the management.
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> (ii) Where, although it is not statutorily obligatory to provide a canteen, it is otherwise an obligation on the employer to provide a canteen, the canteen becomes a part of the establishment and the workers working in the canteen, the employees of the management. The obligation to provide a canteen has to be distinguished from the obligation to provide facilities to run canteen. The canteen run pursuant to the latter obligation, does not become a part of the establishment.

(iii) The obligation to provide canteen may be explicit or implicit. Where the obligation is not explicitly accepted by or cast upon the employer either by an agreement or an award etc., it may be, inferred from the circumstances, and the provision of the canteen may be held to have become a part of the service conditions of the employees. Whether the provision for canteen services has become a part of the service conditions or not, is a question of fact to be determined on the facts and circumstances in each case.

Where to provide canteen services has become a part of the service conditions of the employees, the canteen becomes a part of the establishment and the workers in such canteen become the employees of the management.

(iv) Whether a particular facility or service has become implicitly a part of the service conditions of the employees or not, will depend, among others, on the nature of the service/facility, the contribution the service

> in question makes to the efficiency of the employees and the establishment, whether the service is available as a matter of right to all the employees in their capacity as employees and nothing more, the number of employees employed in the establishment and the number of employees who avail of the service, the length of time for which the service has been continuously available, the nature and character of management, the interest taken by the employer in providing, maintaining, supervising and controlling the service, the contribution made by the management in the form of infrastructure and funds for making the service available, etc."

10. The contention of the petitioner is that the canteen has become an implicit part of the service conditions of the employees having regard to the circumstance that the canteen makes an important contribution to the efficiency of the employees in the establishment, the service of the canteen was available to all the employees over considerable length of time and that the management had entered into a contract with the canteen contractor defining the parameters for the

conduct of the canteen. From the material which has been adverted to in support of the petition it emerges that some time in July, 1978 an agenda item was placed for the consideration of the Board of Trustees of UTI. The Memo adverted to the fact that, in the absence of a separate canteen service, the staff of UTI at Mumbai and in its regional offices availed of lunch facilities at the R.B.I. Officers' Lounge and the canteen run for workmen. The UTI had been paying a subsidy representing difference between the cost of lunch coupons and the actual cost of services to R.B.I. With the shifting of UTI's office to new premises, it had become necessary to make arrangements for providing canteen facilities to the staff. The note then recorded that arrangements are accordingly being made and infrastructure such as furniture and crockery had been provided by the Trust. The services of the canteen were to be subsidised. The Handbook of Personel Policies (for non-management staff) adverted to the provision of canteen facilities as part of an over all welfare arrangement. The petitioner also placed reliance on the agreement entered into by UTI on 9th February, 1988 with the canteen contractor under which it was provided that the caterer would provide food to the members of the staff between stipulated working hours. The caterer agreed to follow such

instructions as may be given by the Personnel & Administration Department of UTI for the purpose of providing food including finalisation of menus from time to time. The rates at which edibles were to be provided were described in the agreement. UTI was not responsible for providing the utensils, crockery, fixtures and fittings but as a matter of good-will, UTI had initially provided some part thereof. The canteen contractor was to be paid a monthly subsidy fixed at Rs.6,19,000/- at the beginning of each month.

11. Evidence was adduced on behalf of the management of UTI in the course of the proceedings before the Industrial Tribunal. Shri R. Subramaniam, Manager, who deposed on behalf of the management, stated that the provision of a canteen was mainly a welfare measure and was not part and parcel of the conditions of service. At Mumbai, UTI had offices at several establishments but no canteen had been provided at Borivali, Thane and Ghatkopar. At the World Trade Centre, the canteen facilities had been discontinued between 1994 and 1995. The witness also deposed that the canteen workers were directly employed by the contractor and did not have to go through the process of rigorous selection that was required for UTI employees. In the settlements of 1986,

1989 and 1990 certain demands that were raised by the union in regard to canteen facilities were, according to the witness, specifically dropped. Smt. Asha H. Shah, Asstt. General Manager who deposed on behalf of the management stated in the course of her examination-in-chief that it was only in July, 1994 when a complaint in regard to the quality of food came to be made by the employees, that a Canteen Committee was constituted on 11th August, 1994. The Canteen Committee however, according to the witness, met only once and not thereafter. According to the witness, the work and conduct of the canteen workmen was never supervised or controlled by the Canteen Committee. One of the allegations of the union was that, when a strike had taken place by the contract workmen, it was the management of UTI that had intervened. The Asstt. General Manager who deposed on behalf of the management as well as an other witness Shri V.D. Kulkarni, denied the correctness of that allegation.

12. On this state of the record, the Industrial Tribunal has held that the canteen is not a part of the conditions of service for the staff of UTI. One of the circumstances upon which this finding rests is that though the union had raised demands in relation to

certain aspects of the functioning of the canteen, those demands were dropped from settlements when they were eventually arrived at. The Industrial Tribunal held that even in Mumbai, canteen facilities were not provided at all establishments. An obligation to provide a canteen was, according to the Tribunal, required to be distinguished from an obligation to provide facilities to run a canteen. The Tribunal held that the provision of the subsidy and the grant of infrastructure facilities by UTI did not *ipso facto* render the canteen as part of the conditions of service of UTI employees.

13. The judgment in **Parimal Chandra Raha (Supra)** elaborates upon the tests that must be applied in considering as to whether a canteen must be regarded as an implicit part of the conditions of service of the employees. After the decision in **Parimalchandra Raha (Supra)** certain other judgments have been rendered by the Supreme Court to which it would be necessary to turn. In **Employers In Relation to the Management of Reserve Bank of India v/s Workmen, reported in (1996) 3 SCC 267,** a demand for the regularisation of 166 employees engaged in the catering establishment of the Reserve Bank of India was referred for adjudication to

the Industrial Tribunal. The Tribunal upheld the claim of the workmen and held that the canteen workmen had become employees of the Reserve Bank of India. The Supreme Court adverted to the judgment of the **Parimal Chandra Raha (Supra)** but held that since the case before the Tribunal had been argued on the foundation of the decision in **M.M.R. Khan's case (Supra),** it was not necessary to consider the submission that propositions 3 and 4 spelt out in para 27 of the judgment in **Parimal Chandra Raha (Supra)** require reconsideration. The Supreme Court noted that, on the one hand the Reserve Bank of India extended a subsidy covering 95% of the costs incurred for maintaining the canteen; there was a canteen committee consisting of officers of the Bank and the bank exercised control in regard to rates of eatables, revision of wages and the reimbursement of expenses in respect of medical evaluation of the canteen employees. On the other hand, the Supreme Court emphasized that the following circumstances distinguished the case from the decision of **M.M.R. Khan case (Supra):**

> "As against the above aspects, the fact remains that according to the Bank it has only a limited role to play regarding the

functioning of the Committee and does not have any control whatsoever on the employees engaged by the Committee so far as taking of disciplinary action against any particular employee is concerned. The Bank has further brought out in cross-examination of the employees' representative that the recruitment of the workers for the canteen is made by the Canteen Committee, and the attendance record as well as the sanctioning of leave to the workers is done by the Committee. It was also brought out in evidence that the only role played by the Bank in the running of the canteen was the nomination of the three members to the Committee. It is common ground that the canteen run by the Implementation Committee (Canteen Committee) is not under any legal obligation as was the case in M.M.R. Khan case. Moreover, there is no right in the Bank to supervise and control the work done by the persons employed in the canteen nor has the Bank any right to direct the manner in which the work shall be done by various persons. The Bank has absolutely no right to take any disciplinary action or to direct any

> canteen employee to do a particular work. Even according to the Tribunal, the Bank exercises only a 'remote control'. We are of the view that in the absence of any obligation, statutory or otherwise, regarding the running of a canteen by the Bank and the details relating thereto similar to Factories Act or the Railway Establishment Manual, and in the absence of any effective or direct control in the Bank to supervise any control the work done by various persons, the workers in the canteen run by the Implementation Committee (Canteen Committee) cannot come within the ratio laid down by this Court in M.M.R. Khan case."

The Supreme Court then dealt with the provision of a subsidy and the extension of other facilities provided by the Bank for the conduct of the canteen. The Supreme Court held that these facilities were only extended to ensure that service of a certain stipulated quality was provided to the employees and would not amount to a recognition that the canteen was a paramount condition of service. The Supreme Court held as follows:-

> "As per the agreement the Bank has detailed the subsidy and other facilities afforded by it to run the canteen and has also stipulated certain conditions necessary for conducting the canteen in a good, hygienic and efficient manner like insistence of the quality of food, supply of food, engagement of experienced persons etc. Such conduct cannot in any manner point out any obligation in the Bank to provide 'canteen' as wrongly assumed by the Tribunal."

14. The issue in regard to the status of the canteen workmen was revisited in a subsequent decision of the Supreme Court in **State Bank of India & ors. v/s State Bank of India Canteen Employees' Union (Bengal Circle) & ors., reported in (2000) 5 SCC 531.** The State Bank of India was in appeal before the Supreme Court in regard to a direction for regularisation that was granted by the Tribunal. The Supreme Court held that the facts were similar to those in the **Reserve Bank of India** decision and came to the conclusion that there was no obligation statutory or otherwise on the part of the bank to run the canteen. In para 28 of the judgment the Supreme Court held as follows:-

"There is no obligation statutory or otherwise to run the canteens by the Bank. The scheme as stated above only provides for grant of subsidy, for promoting running of a canteen and if some more cost is incurred in running the canteen, the members of the staff working in that particular branch are required to bear it. The Bank is not employing the canteen workers. The Bank is not supervising or controlling the work or the details regarding the canteen or its employees appointed by the Local Implementation Committee. Auditing the work of the Local Implementation Committee - whether subsidy given by it is properly utilised or not, also would not be a ground for holding that the Bank is having any control in running the canteen. The bank is not taking any disciplinary action or directing any canteen employee to do a particular work or for that purpose no scheme is laid down by the Bank. Not only this, the other most important aspect is the recruitment by the Bank is to be made as per the statutory rules framed by it after giving proper

> advertisement, test and/or interview. As against this, for appointing a canteen employee there are no rules framed by the Bank."

The Court held that the subsidy which was provided would not amount to a recognition of the canteen having become a part of the conditions of service of the employees of State Bank of India. At the most, the Supreme Court ruled it could be inferred that the Bank had an obligation to promote the running of the canteen at its branches as a part of its staff welfare activities. The Court held that even presuming that the privilege of providing the canteen facilities to the employees existed, yet it would be difficult to hold that the Bank should provide the said facility by running a canteen by itself.

15. The judgments of the Supreme Court in **Reserve Bank of India and in State Bank of India (Supra)** would have a significant bearing on the manner in which the facts of a case such as the present should be approached. There is admittedly no statutory obligation cast on the employer to provide and maintain the canteen here. The mere circumstance that the employer has taken requisite

steps for entering into a contract with the canteen contractor by incorporating terms and conditions that would ensure the provision of service of a certain quality to the members of staff cannot be construed to mean that the provision of the canteen is a part of the conditions of service. For one thing it is clear that even in the city of Mumbai, all establishments of UTI have not provided canteen facilities to the workmen. Secondly, the evidence on record also demonstrates that the facilities of the canteen have been discontinued from time to time even when they were provided at an anterior point in time. Thirdly, even if a canteen facility has been provided over time in regard to certain establishments that does not require that the employer should provide a canteen facility himself by or through directly appointed workmen. The provision of a welfare measure like a canteen facility can be equally achieved efficiently by recruiting the services of contractor and so long as that arrangement is not sham or bogus, the law would not presume that the canteen has become a part of the establishment of the principal employer. The provision of a subsidy or, for that matter, making available infrastructure for the conduct of the canteen has been held not to be adequate in itself to sustain the inference that the canteen has

become a part of the establishment of the principal employer.

16. Apart from the aforesaid circumstances, it would be necessary to advert to the affidavit dated 14th January, 2006 that is filed on behalf of UTI in this proceeding. The affidavit deals with events that took place after the matter was concluded before the Tribunal which have an important bearing on the outcome of the present proceedings. By virtue of the provisions of the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002, the erstwhile UTI was split into two parts; the first being the Administrator who was under Section 7(1) read with a Notification dated 15th January, 2003 required to administer the Specified Undertaking of UTI. The second part was the UTI Trustee Company Pvt. Ltd. (represented through UTI Mutual Fund). The specified company came into existence on 1st February, 2003. The administrator was required to manage schemes mentioned in Schedule-I of the Repealing Act, such as Unit Scheme-64. The schemes mentioned in Schedule-II of the Repealing Act are launched by the UTI Trustee Company Pvt. Ltd. The UTI Asset Management Company Pvt. Ltd. is a fund manager for the UTI Mutual Fund. Under Section 6(1) of the Repealing Act, the erstwhile

employees of UTI became employees of UTI Asset Management Company Pvt. Ltd. The Company introduced a scheme for voluntary retirement between September and October, 2003 and it has been stated that nearly 50% of the employees have opted for voluntary retirement. The Court has now been informed that there is no vacancy in the relevant category.

17. In the present case, it has also emerged from the proceedings before the Court that the contract with the erstwhile contractor came to an end by efflux of time on 31st December, 2003. During the pendency of these proceedings, on 17th December, 2003 an ad-interim order was passed by the Court pending admission, by which the statements of UTI and the canteen contractor were recorded to the effect that the services of the canteen workmen would not be terminated. The petition was admitted on 24th February, 2004 but interim relief was refused. The canteen was thereupon closed down and the canteen activity has now been discontinued.

18. The judgment of the Tribunal does not, therefore, warrant interference in the exercise of the extraordinary jurisdiction of this Court. The court has been informed that the workmen have instituted

proceedings before the appropriate forum for the payment of their terminal dues. It would be open to the workmen to move that forum for expedited disposal of the proceedings and if such an application is made, the Tribunal concerned, shall consider the request for expedition. The present petition shall stand dismissed. There shall be no order as to costs.

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(DR. D.Y.CHANDRACHUD, J.)